Supreme Court, U.S.
FILED

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NO. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1999

Nabil El-Ramly,

Petitioner,

vs.

University of Hawaii; David Bess, individually and in his capacity as Dean of the College of Business Administration, University of Hawaii

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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27pp

QUESTION PRESENTED

Whether the district court erred in requiring Petitioner Nabil el-Ramly produce direct evidence of racial/ethnic discrimination in order to survive a Rule 50, Fed.R.Civ. motion for directed verdict?

Whether a grant of a Rule 50, Fed.R.App.P. motion dismissing a race/national origin discrimination complaint is proper when such a claim is inseparately intertwined with an age discrimination claim as part of a single allegation?

PARTIES TO THE PROCEEDINGS

Parties to this Petition are Petitioner Nabil EL-Ramly and Respondents University of Hawaii and David Bess, individually and in his capacity as the Dean of the University of Hawaii, College of Business Administration.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Nabil El-Ramly prays that a writ of certiorari issue to review the judgment of the United states court of Appeals for the Ninth Circuit in order the bring the district court's opinion into consistency with the controlling law of this Court.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is not published, but is set forth in Appendix "A." The opinion of the district court is not published because the challenged questioned presented was orally give at the conclusion of Petitioner's presentation of his evidence.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 18, 1999. The Petitioner's submission for rehearing and suggestion for

rehearing en banc was denied on October 12, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

STATUTORY PROVISIONS INVOLVED

Rule 50, Fed.R.Civ.P., provides in relevant part:

> (a) Judgment as a Matter of Law.
> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

42 U.S.C. Section 2000e-2 provides:

> (a) Employer practices It shall be an unlawful employment practice for an employer ------
> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

STATEMENT OF THE CASE

Petitioner Nabil El-Ramly is an Egyptian of Arab descent, who at all times relevant, was a senior faculty member at the Respondent University of Hawaii. On May 8, 1996, Petitioner filed an employment discrimination complaint in the U.S. District Court (Hawaii) alleging, inter alia, that Respondents

> . . . intentionally discriminated against El-Ramly and/or deprived him

> of the full benefits afforded to others because of his Egyptian race, national origin and/or age.

At trial, upon the conclusion of Petitioner's case, Respondents then moved for judgment under Rule 50, Fed.R.Civ.P. The trial court grant the motion only as to race/national origin discrimination. In so doing, the court stated:

> I've tried many of these cases and there's always somebody that says we've got to get rid of that lousy mik, or something like that. Trial transcript 1/12/98 at p.94.

In the trial court's view, Respondent failed to produce sufficient evidence to send the issue of race/national origin discrimination to the jury, although the age discrimination charge was

tried in its entirety. Id. 1/15/98 at 71. At the same time, the trial court denied the Respondents's motion for a directed verdict on Petitioner's age discrimination claim at the close of Petitioner's case and once again at the close of trial. Id. 1/15/98 at 74. The jury found in favor of Respondents and against Petitoner on all remaining claims.

The Court of Appeals affirmed the trial court in all respects on May 18, 1999 and subsequently denied Petitioner's petition for rehearing and suggestion for rehearing en banc on October 12, 1999.

REASONS FOR GRANTING THE WRIT

I.

The district court's grant of Respondents's Rule 50, Fed.R.Civ.P. motion conflicts with this Court's opinion in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) wherein, the Court stated :

...we are convinced that the inquiry involved in a ruling on a motion for...a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If the defendant in a run-of-the-mill civil case moves for...a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakenly favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. ...
The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict --- "whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of

proof is imposed." [Citation omitted]

Petitioner's allegation that Respondents's actions violated Section 2000e-2(a)(1) with respect to his race, national origin and age taken, not in discrete protected categories, but rather as a whole is not amenable to a directed verdict when more than one protected category is involved in a single claim involving a single act by Respondents and when the trial court grants a motion for directed verdict on one protected category and allows the other protected category to proceed to final judgment.

The court of appeals failure to correct and remand the issue can not be sustained on any alternative grounds consistent with controlling Supreme Court authority.

II.

This Petition should be granted because the trial court, as affirmed

by the court of appeals, erroneously applied a rule that Petitioner produce direct evidence of unlawful discrimination in order withstand a motion for directed verdict.

In St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), the Court reaffirmed its decisions in McDonnell Douglas v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) wherein direct evidence of unlawful discrimination is not required in order to establish a prima facie case. Rather, such case my be (and more often is) established by circumstantial evidence.

Novel to the foregoing questions is the situation wherein a combination of protected categories, rationally alleged as the basis for unlawful discrimination, is subjected to a motion for directed verdict and where the trial court

grants to motion as to one category and not the other, segmenting a claim in a manner not alleged.

CONCLUSION

While this case may not present issues of exceptional importance, it does characterize an increasingly widespread occurrence in trial courts where claims of unlawful discrimination in employment have been presented. Otherwise stated, dispositive motions should not be used as a means of according summary trial of matters that should ordinarily be submitted to a jury.

Accordingly this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NABIL EL-RAMLY,

Plaintiff-Appellant,

v.

UNIVERSITY OF HAWAII and DAVID BESS, individually and in his capacity as the Dean at the University of Hawaii's College of Business Administration,

Defendants-Appellees.

FILED

MAY 18 1999

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

D.C. No. CV-96-00440-SPK
No. 98-15266

MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
Samuel P. King, District Judge, Presiding

Argued and submitted April 28, 1999 Honolulu, Hawaii
Before: FARRIS, NOONAN, and GRABER, Circuit Judges.

Plaintiff Nabil El-Ramly claims the district court erred in

granting judgment as a matter of law on some of his claims at the conclusion of his case-in-chief, in excluding the testimony of some of his witnesses, in instructing the jury on the elements of a retaliation claim, in granting partial judgment on the pleadings, and in making comments, questions, and rulings in front of the jury that would deprive El-Ramly of a fair trial. We find no error requiring reversal and affirm the verdicts for the defendants on all counts. As the facts of this case are familiar to the parties,

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3. 1

This Court will not summarize those facts.

The district court's conclusion that no reasonable juror could find that El-Ramly was discriminated against based on race, color, or national origin was not in error. See Glover v. BIC Corp., 6 F.3d 1-) 18, 1325 (9th Cir. 1993). To present a prima facie case of discriminatory discharge through circumstantial evidence, "the plaintiff must show he was: (1) a member of a protected class [age 40-70]; (2) performing his job in a satisfactory manner; (3) discharged; and (4) replaced by a substantially younger employee with equal or inferior qualifications." Wallis v. J.R. Simplot Co., 26 F.3d 885, 891 (9th Cir. 1994) (in the Age Discrimination in Employment Act (ADEA) context). El-Ramly failed to present evidence such that a reasonable jury could find that he was not fired or constructively discharged for inadequate job performance. See Lynn v. Regents of the University of California, 656 F.2d 1337, 1344 (9th Cir. 1981) ("Without doubt, deficient scholarship is a legitimate, nondiscriminatory reason to deny salary increases or, tenure."), gem denied, 459 U.S. 823

(1982).

El-Ramly contends the district court erred in granting a directed verdict on his negligence claim. "A prerequisite to any negligence action is the existence of a duty owed by the defendant to the plaintiff." Cuba v. Fernandez, 801 P.2d 1208, 1211 (Haw. 1990). El-Ramly has not cited any Hawaii case indicating such a duty exists. As well, the dismissal of the race, color, and national origin claims and the jury verdict on the age and retaliation claims indicates even if a duty existed, it was not breached. The district court did not err in dismissing this claim.

El-Ramly also claims the district court erred in granting a directed verdict on his intentional infliction of emotional distress claim. In light of the record, no action alleged or proven by El-Ramly could reasonably be considered utterly intolerable in a civilized community or lead a reasonable juror to exclaim, "Outrageous!"

See Ross v. Stouffer Hotel Co. (Hawai'i) Ltd., Inc., 879 P.2d 1037, 1048 (Haw. 1994). The district

court did not err in dismissing the intentional infliction of emotional distress claim.

El-Ramly argues the district court erred in limiting or excluding the testimony of some of his witnesses. Rulings regarding the admissibility of evidence are reviewed for an abuse of discretion. See EEOC v. Pape Lift. Inc., 115 F.3d 676, 680 (9th Cir. 1997). The district court's conclusions regarding the relevance, speculative nature, or leading manner of questioning do not constitute an abuse of discretion.

El-Ramly contends that the district court erred in instructing the jury regarding his retaliation claim, pursuant to 42 U.S.C. § 20OOe-3. "The district court has substantial latitude in tailoring jury instructions, and we review those instructions for an abuse of discretion. If the instructions are challenged as a misstatement of the law, they are then reviewed de novo."'

Mockler v. Multnomah County, 140 F.3d 808, 812 (9th Cir. 1998) (internal citation omitted).

The district court's instructions, which required El-Ramly to

prove the elements of a hostile work environment claim, were in error. Nonetheless, "an error in instructing the jury in a civil case does not require reversal if the error was 'more probably than not harmless. The harmless error standard used in a civil case is less stringent than that used in a criminal case." Id. at 812-13 (internal citations omitted). As well, if the instructions, when considered as a whole, were not prejudicial to El-Ramly, this Court will affirm. See In re Asbestos Cases, 847 F.2d 523, 524 (9th Cir. 1988). The error was more likely than not harmless. Cf. Mockler, 140 F.3d at 813-14.

El-Ramly contends that the district court erred in dismissing his state law claims (negligence, intentional infliction of emotional distress, and violation of Haw. Rev. Stat. § 378) against the University of Hawaii under Eleventh Amendment immunity. This Court reviews a judgment on the pleadings de novo. See Nelson v. City of Irvine, 143 F.3d 1196, 1200 (9th

Cir.), cert. denied, U.S. 119 S.Ct. 444 (1998). Eleventh Amendment immunity may be waived., but the Supreme Court has "insisted ... that the State's consent be unequivocally expressed." Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99 (1984). Act 135 of the 1984 Hawaii legislature states in Section 1:

> The purpose of this Act is to expressly restate, reiterate, and declare the intent of the legislature in amending section 661-1 and 662-3, Hawaii Revised Statutes, in 1978 to extend jurisdiction to district courts in tort actions on claims against the State and certain other claims against the State, was originally and is now to extend jurisdiction for such actions and claims against the State to state district courts, and not to extend jurisdiction for such actions and claims to federal district courts.

This Act is a response to the court's erroneous interpretation of section 662-3, Hawaii Revised Statutes, in **In re Holoholo,** 512 F. Supp. 889 (D. Haw. 1981). 1984 Haw. Sess. Laws 135. Hawaii has unequivocally asserted its immunity. This Court requires the district court to employ a five-factor test to determine whether the University of Hawaii is an "arm of the state." See Doe v. Lawrence Livermore National Laboratory, 65 F.3d 771, 775 (9th Cir. 1995), rev'd on other grounds sub

nom. Regents of the University of California v. Doe, 519 U.S. 425, 428 n.2 (1997). The five factors are "[1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has power to take property in its own name or only the name of the state, and [5] the corporate status of the entity." ITSI TV Productions, Inc. v. Agricultural Ass'ns, 3 F.3d 1289, 1292 (9th Cir. 1993). The district court erred in only analyzing the first of the five factors to conclude that the University of Hawaii was an arm of the state, noting that, pursuant to Haw. Rev. Stat. § 304-6 (1997), the University of Hawaii is subject to suit "only in the manner provided for suits against the State, and any liability incurred by the university in such a suit shall be the liability of the State." The district court's conclusion that the University of Hawaii is an arm of the state is not in error though because "the first of these [five factors] is the 'most important factor."' Id. at 1292. In so holding, we do not address the changes made to Haw. Rev. Stat. § 304-6 in

1998.

El-Ramly contends the district court erred in finding that Bess, as an individual, could not be liable as a matter of law under Title VII or the ADEA. The district court properly relied on this Court's decision in Miller v. Maxwell's Int'l Inc., 991 F.2d 583 (9th Cir. 1993), cert. denied sub nom. Miller v. La Rosa, 5 10 U.S. 1109 (1994). El-Ramly has not presented a compelling argument as to why this Court should ask an en banc court to overrule Miller.

Finally, El-Ramly claims that the district court's comments, questions, and rulings contested in this appeal denied him a fair trial. The individual rulings are addressed separately throughout this memorandum disposition. El-Ramly's general allegations, unsupported by Excerpts of the Record containing the alleged prejudicial comments and questions and unsupported by legal authority, justify summary affirmance. See Fed. R. App. P. I 0(b)(2); Syncom Capital Corp. v. Wade, 924 F.2d 167, 169-170 (9th Cir. 1991) (failure to provide an adequate record for appeal precludes appellate

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NABIL EL-RAMLY,

NT.

Plaintiff-Appellant,

UNIVERSITY OF HAWAII and DAVID BESS, individually and in his capacity as the Dean at the Uniiversity of Hawaii's College of Business Administration,

Defendants-Appellees.

Before: FARRIS, NOONAN and GRABER, Circuit Judges:

FILED

0CT 12, 1999

Cathy A- Catterson, Clerk
U.S. Court of Appeals

No. 98-15266 Court of Appeals

D.C. Civ. No. 96-00440 SPK

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Graber has voted to reject tile suggestion for rehearing en banc and Judges

Farris and Noonan recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for rehearing en banc is REJECTED.

review).

AFFIRMED.